

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between

**FRATERNAL ORDER OF POLICE,
LODGE #5**

OPINION & AWARD

-- and --

**Case No. 14 390 00189 13
Termination of K. Amato**

CITY OF PHILADELPHIA

ARBITRATOR: James M. Darby, Esq.

APPEARANCES: For the FOP:
Mark L. Gelman, Esq.
Jennings Sigmond, P.C.

For the City:
Brian J. Pierce, Esq.
Assistant City Solicitor

This case arises out of the City of Philadelphia's ("the City") termination of Police Officer Kristine Amato ("the Grievant") for conduct unbecoming an officer and neglect of duty. The Fraternal Order of Police, Lodge #5, filed a grievance alleging that there was no just cause for the Grievant's termination. The parties were unable to resolve the grievance.

By letter dated March 14, 2013, from the American Arbitration Association ("AAA"), the undersigned was notified of his selection as Arbitrator of this

dispute. A hearing was held on January 10, 2014, at the AAA offices in Philadelphia, Pennsylvania, where the parties were afforded a full opportunity to present testimony, exhibits and arguments in support of their positions. The parties presented oral closing statements in lieu of filing post-hearing briefs, after which the record was closed. After fully considering all of the evidence and arguments presented, the matter is now ready for final disposition.

QUESTION TO BE RESOLVED

At the commencement of the hearing, the parties stipulated to the following issue to be resolved by the Arbitrator:

Did the City have just cause to dismiss the Grievant, Kristine Amato?
If not, what shall the remedy be?

REMEDY REQUESTED

The Union requests that: 1) the grievance be sustained; 2) the Grievant be reinstated and made whole; 3) any record of her discipline be expunged; and 4) the Arbitrator retain jurisdiction for the purposes of resolving any disputes over the implementation of the Award.

BACKGROUND

The Grievant was hired by the City Police Department (“the Department”) as a police officer on January 8, 1990. On June 18, 2007, she was assigned to the Evidence Custodian Unit (“ECU”). On June 7, 2011, the Grievant sustained a [REDACTED] while on duty. On July 30, 2012, ECU Commanding Officer Captain Brian Wilson requested that the Department’s Internal Affairs Division (“Internal Affairs”) investigate the Grievant’s use of Injury on Duty (“IOD”) time. At that time, the Grievant was assigned to light-duty work and was using IOD time to attend appointments with her [REDACTED].

The Internal Affairs investigation disclosed that on six occasions the Grievant left work early for [REDACTED] ([REDACTED]) but the appointments were cancelled either by [REDACTED] or the Grievant. Additionally, Internal Affairs determined that on June 12, 2012, the Grievant left work early for the purpose of receiving [REDACTED] but no such [REDACTED] was scheduled. Based on these events, Internal Affairs concluded that the Grievant was paid \$899.85 in IOD time (30 hours) to which she was not entitled. (Internal Affairs Report (“the Report”) (City Exhibit 1.)

The Department terminated the Grievant effective January 28, 2013. It found the Grievant guilty of the following specific charges:

1. Conduct Unbecoming an Officer – Section 1-§010-10 (Making a false entry in any Department record or report.) The Department found that the Grievant defrauded the City of 30 hours in IOD

- time by reporting that she was leaving work to attend [REDACTED] on seven dates when she actually never received [REDACTED] nor did she inform her supervisor of the same.
2. Conduct Unbecoming – Section 1-§021-10 (Any incident, conduct, or course of conduct which indicates that an employee has little or no regard for his/her responsibility as a member of the Police Department.) The Grievant misrepresented facts by reporting that she was leaving work to attend [REDACTED] on seven dates when she actually never received [REDACTED] nor did she inform her supervisor of the same.
 3. Neglect of Duty – Section 5-§009-10 (Absence without leave for less than one working day.) The Department found that the Grievant was absent without authority by reporting that she was leaving work to attend [REDACTED] on seven dates when she actually never received [REDACTED] nor did she inform her supervisor of the same to have her absence covered or return to work after the [REDACTED] was cancelled.

(City Exhibits 2-3.)

Lieutenant William Donahue testified that he conducted the Internal Affairs investigation. He explained that the Grievant worked from 7:00 a.m. to 3:00 p.m. and informed her supervisor when she was leaving work for her [REDACTED] and [REDACTED]. On June 4, 2012, the Grievant left work at City Hall and the [REDACTED] subsequently cancelled the appointment. She did not return to work after the cancellation and was paid for a full day. Donahue also stated that on June 6, 2012, the Grievant left early for [REDACTED] but then cancelled the appointment because she had to pick up her grandson at school. She was paid for the whole day.

Donahue explained that the Grievant engaged in similar behavior on five other occasions – leaving work for [REDACTED] but not actually going for [REDACTED]. On each occasion, she failed to return to work or contact her supervisors to inform them that her appointments were cancelled or that she would not be returning. According to Donahue, on one of the days (June 12, 2012) the Grievant left work early but actually had no [REDACTED] scheduled.¹ He explained that during her interview, the Grievant admitted she had left the office early on the dates in question to go to her appointments, but she could not recall where she went after the appointments were cancelled.

On cross-examination, Donahue testified that Internal Affairs conducted surveillance of the Grievant's activities for eight days in August 2012. It determined she was reporting to work on time and attending all of her [REDACTED]. Donahue also averred that the Grievant admitted she canceled four of the [REDACTED] appointments. However, she stated she only did so due to circumstances that arose after she left the office. Donahue stated he had no evidence to the contrary, except for June 12, 2012, when the Grievant admitted that she left work early when no appointment was scheduled.

Additionally, Donahue did not know if the Grievant was informed that she had to return to work after her [REDACTED] or in the event they were cancelled.

¹ The Internal Affairs Report includes an appointment card that shows an appointment scheduled for June 12, 2012.

The “Limited Duty Instructions” for on-duty injuries provides that “[y]ou are granted reasonable travel time to and from City authorized appointments as well as time for the appointments.” It makes no specific reference to returning to work after the appointments or cancellations. (Union Exhibit 1.) Donahue testified further that the Grievant was required to return to the office even after seeing her [REDACTED] or [REDACTED], unless she informed her supervisor otherwise. He could not cite to a specific policy addressing the issue.²

Police Commissioner Charles H. Ramsey testified that he terminated the Grievant because she misused IOD time. He explained that she violated the “core values” of the Department; namely, “honor and integrity.” Chief Ramsey described the Grievant’s actions as a serious violation of her officer’s oath and warranted her discharge. He introduced a document showing the names of 17 other officers who were also terminated for theft of time.

On cross-examination, Chief Ramsey emphasized that if the Grievant’s [REDACTED] were cancelled after she left the office she should have either returned to work or taken personal leave. He added that she did not even call to notify her supervisor of the cancellations or call for instructions. Ramsey reiterated: “It is not a free day off.”

² The Report shows that the Grievant’s supervisors did not expect the Grievant to return to work after her appointments. If she had two appointments scheduled for one day, she was allowed to receive 8 hours of IOD pay regardless of the time of the appointments. For example, on August 10, 2012, the Grievant received 8 hours of IOD time even though her two appointments were over by 10:56 a.m. (City Exhibit 1.)

The Grievant testified that after sustaining her [REDACTED] on June 7, 2011, she was at various times on full-time [REDACTED] light duty and full-time duty. In June 2012, she was again on light duty status whereby she was not permitted to lift any heavy boxes. She was also permitted to leave work early to receive [REDACTED]. According to the Grievant, she never received any specific direction regarding her obligations while on light-duty, other than the Limited Duty Instructions she signed in August 2011 (Union Exhibit 1). She was never told what to do after leaving the [REDACTED] appointment or in the event an appointment was cancelled.

The Grievant testified that whenever she left early for an appointment she notified one of her three supervisors and provided them with the [REDACTED] appointment card. The supervisor made a copy of the card, and the Grievant understood that the supervisor made an entry of IOD time in the Daily Attendance Report ("DAR"). The Grievant stated she had no access to the DAR system.

The Grievant also testified that she would see her [REDACTED] every two weeks, who would give her an "Encounter Form" updating her [REDACTED]. The Forms were sent to the Safety Office and the Grievant gave her supervisors a copy. On the June 13, 2012, Encounter Form, her [REDACTED] as follows: "[REDACTED]" (City Exhibit 1).

Additionally, the Grievant described her commute to work and to the [REDACTED]. Since she parked her vehicle at the train station each day, the Grievant needed to return to her car by train and then drive to her appointments. The entire trip from door to door is approximately one hour.³ The Grievant testified that she never returned to work after the appointments because her [REDACTED] had requested she work only a half day on days of appointments. The Grievant also stated that her supervisors understood that on her appointment days she only worked a “four hour tour of duty.”

According to the Grievant, on [REDACTED] [REDACTED], she arrived at the [REDACTED] office and was told the [REDACTED] was not there. She then went home. On [REDACTED], she was on the train heading to her appointment when her daughter called and the Grievant had to pick up her grandson from school. The Grievant called the [REDACTED] to reschedule the appointment. She denied telling Internal Affairs that she had no [REDACTED] scheduled for June 12, 2012. The Grievant averred she told them she had no “other” appointments that day.

The Grievant also stated that on every day she left work early she was required to present documentation showing that she had an appointment

³ The Internal Affairs investigation found that the Grievant was reassigned from City Hall to Erie Avenue after [REDACTED]. The Report states that the travel time from Erie Avenue to her [REDACTED] is only 28 minutes. (City Exhibit 1.)

scheduled, including June 12, 2012. No one ever asked her where she went after her appointments or how long her appointments were.

On cross-examination, the Grievant testified that her appointments generally lasted about 30 minutes, but she did not always see the [REDACTED] right away. She testified that she never asked any of her supervisors for guidance regarding her obligations as a light duty employee.

POSITIONS OF THE PARTIES

The City maintains that the Grievant's termination must be upheld. It emphasizes that the Grievant is "not a rookie," and her excuse that no one gave her any guidance is "insufficient." Even subtracting out the commuting time involved, the record shows the Grievant "stole" at least 30 minutes of time on each of the days in question. The City also emphasizes how serious Commissioner Ramsey takes theft of time cases and how he believes that officers who abuse IOD time blemish the honor and integrity of the position.

The City submits that the Grievant cancelled four of the appointments in question. It also raises the possibility that the Grievant abused IOD time on other days as well, but the 7 days was all Internal Affairs was able to find. The City argues that the instant charges do not even cover the days the Grievant attended her appointments for only a half-hour and did not thereafter return to work as required.

Additionally, the City submits that unlike previous discharge cases that were overturned in arbitration, here the City has presented numerous examples of other police officers who were terminated for fraud and/or stealing time. It maintains that if the Grievant had any confusion over her obligations while on IOD time, she should have asked a supervisor for clarification. Instead, she “deliberately stuck her head in the sand.” The City also insists that it is not the Arbitrator’s role to impose his own judgment and reduce the discipline to something less than termination. Commissioner Ramsey has determined that termination is the appropriate penalty for this type of offense, and his discretion in this regard should not be second-guessed.

The Union argues that the City has failed to establish it had just cause to terminate the Grievant. It submits that the punishment imposed here was far too excessive under the circumstances. First, the Union emphasizes that there is no evidence that the Grievant intentionally defrauded the City or had any improper motive on the seven days cited. Without any “advance plan,” the Grievant left work early with the intent to attend her appointments.

While in hindsight the Grievant perhaps should have contacted her supervisor for instructions, the Union notes that it is undisputed she received no training or guidance on her obligations in the event her appointment ended early or was cancelled. The only information she received is the short paragraph contained on the Limited Duty Instructions, which does not provide any guidance

in this regard. Furthermore, the Encounter Form she received from her [REDACTED] was “very clear” that the Grievant was to be given [REDACTED]. The Union maintains that the Grievant’s supervisors certainly knew she was not returning to work after her appointments.

Regarding the June 12 incident, the Union insists that the City has failed to show there was no appointment scheduled for that day. The evidence shows that the Grievant was only permitted to leave after showing a supervisor proof of a scheduled appointment. Moreover, the Internal Affairs investigation contains a copy of an appointment card for June 12. The Union likens the Internal Affairs investigation of the Grievant to a “witch hunt,” and notes that although the Internal Affairs conducted surveillance throughout the month of August, it was only able to cite her for seven days in June.

Turning to the level of discipline, the Union contends that the evidence does not support all of the charges. There is no evidence that the Grievant made any false entries. Rather, she merely failed to notify her supervisors that her appointments were cancelled “after-the-fact.” In any event, this offense provides a range of discipline from a 5-day suspension to dismissal. The charge of “little or no regard for her officer responsibilities” is at odds with the evidence showing that the Grievant always had a valid appointment scheduled when she left work early. Additionally, this charge carries a range of discipline, and the City unreasonably imposed the harshest penalty available.

The Union concedes that at most the third charge, absence without leave, may be implicated here. It notes that this offense calls for only a 2 to 5 day suspension, not termination. It also distinguishes the previous cases relied on by the City. In each of those cases, the Union maintains the officer engaged in far more serious misconduct than the Grievant herein. Specifically, those cases involved employees who stole time over a far greater period of time, and who affirmatively forged or altered documents in furtherance of their misconduct.

DISCUSSION

The undersigned must decide whether just cause exists for the Grievant's termination. The City charged the Grievant with Conduct Unbecoming an Officer (making a false entry and having little or no regard for her police responsibilities) and Neglect of Duty (being absent without leave).

It is undisputed that on seven dates in [REDACTED] ([REDACTED]) the Grievant left work early for [REDACTED] but did not actually receive any [REDACTED]. On three of the dates ([REDACTED]) the [REDACTED] cancelled the appointment after the Grievant left the office. On four dates the Grievant cancelled the appointments after she left work ([REDACTED]), or did not report for [REDACTED] (June 12).⁴ The City maintains that by failing to

⁴ Regardless of whether there was an appointment actually scheduled for June 12, 2012, the evidence shows that the Grievant received 3.5 hours of IOD time that day, but she did not receive [REDACTED]

return to work on these days, or at a minimum, to contact a supervisor to receive further direction, the Grievant abused IOD time.

On August 12, 2011, the first time she went on light duty, the Grievant signed the Limited Duty Instructions Form. Paragraph 5 of the Form states as follows:

While working in this assignment, you are on duty and expected to serve a full tour, unless otherwise specified by the City treatment Provider. You are granted reasonable travel time to and from City authorized appointments as well as time for the appointment(s). During such absences from your Limited Duty Unit, you will be carried on the Daily Attendance Report as 'I.O.D.' to the nearest half-hour. You are to furnish proper documentation to the Limited Duty Unit supervisor to cover your absences from the Unit.

The foregoing clearly shows that the Grievant was obligated to work a full tour of duty, except when she was absent and placed on IOD status for *“reasonable travel time to and from City authorized appointments as well as time for the appointment(s).”* (Emphasis added.) Quite simply, when her appointments were cancelled she no longer needed “[IOD] time for the appointment.”

There may have been instances (when she was working at City Hall) that by the time the Grievant learned her appointment was cancelled, there would have been so little time left in her work day that it would not have made sense for her to commute back to Center City to return to work. However, this was not the Grievant’s “call” to make. She should have contacted her supervisor to obtain

direction on how to proceed. The Grievant's failure to take this initiative warrants a finding that she was absent without leave on the days in question.

The Grievant's decision to cancel or not show up for four of her appointments is more troubling. Regardless of the reasons for the Grievant missing the [REDACTED], she certainly had no entitlement to IOD pay under such circumstances. By cancelling or missing her appointments and not returning to work, the Grievant clearly abused IOD time on [REDACTED]. I find that this constitutes behavior that reflects "little or no regard for her responsibility as a member of the Police Department."⁵

The question then becomes whether the penalty of termination was appropriate in this case. Thus, under a just cause analysis the Arbitrator must determine whether the discipline imposed is reasonably related to the seriousness of the involved misconduct; that is, whether the "punishment fits the crime." When doing so, the Arbitrator will analyze a number of factors, including whether there are any mitigating circumstances present and/or whether any lesser penalty would have reasonably and appropriately corrected the employee's behavior.

The penalty range for displaying "little or no regard for his/her responsibility as a member of the Police Department" is a 30-day suspension to

⁵ The evidence does not support a finding that the Grievant made false entries in any Department record or report.

dismissal. The penalty range for absence without leave is a 2 to 5-day suspension. Thus, the City imposed the harshest and most extreme punishment available when it terminated this 23-year employee. (Joint Exhibit 3.)

Clearly, the Grievant engaged in serious misconduct. She was paid for IOD time on seven occasions under circumstances where she knew, or should have known, she was not entitled to the same. While the [REDACTED] cancellations may have been beyond her control, in the other instances she simply cancelled or chose not to attend her [REDACTED], yet collected IOD pay for her time off. By doing so the Grievant stole IOD time, which warrants substantial discipline.

While the Grievant clearly “buried her head in the sand” by failing to ask for direction when her appointments were cancelled, the Grievant’s supervisors could have also done more to communicate their expectations. The record supports the Grievant’s testimony that her supervisors consistently treated her appointment days as half-days or full days off (depending on whether she had one or two appointments). There is no evidence that the Grievant’s supervisors ever inquired about the length of her appointments or required her to return to work after her appointments.

[illegible]

██████████”), contributed to an overall lack of clarity concerning the Grievant’s obligations while on IOD time. Rather than asking the Grievant some simple questions about her whereabouts, and alerting her to the Department’s expectations regarding IOD time, ECU referred the matter to Internal Affairs.

Furthermore, the facts in the cases relied on by the City do not support terminating the Grievant. In those cases, the employees engaged in affirmative misrepresentations (in some cases falsifying documents) as a ruse to obtain excessive amounts of paid leave time. In several of the cases, the officers then lied to cover up their wrongdoing.

Here, the evidence shows that when the Grievant left work early she did so based on validly scheduled ██████████ appointments or ██████████. Unlike the cases cited by the City, there is no evidence here of a calculated pattern or plan to defraud the City. Thus, Internal Affairs’s surveillance established that the Grievant’s misbehavior ended with the June dates, months before she was even interviewed. Furthermore, the Grievant in both her Internal Affairs interview and at the arbitration hearing admitted to her wrongdoing. It is noteworthy that the Grievant has been with the Department for 23 years, and for the last 14 of those years was discipline-free.

The foregoing factors are not excuses for the Grievant’s misbehavior. The Grievant’s actions were unacceptable and warrant stringent punishment. However, based on the foregoing, the undersigned concludes that her behavior

did not warrant imposing the most severe penalty in the “Conduct Unbecoming” range. To the contrary, the record strongly suggests that a lesser penalty would have led to the Grievant quickly altering her behavior.

Accordingly, the undersigned concludes that the City did not have just cause to terminate the Grievant. After considering the totality of the circumstances of this case, balancing the seriousness of the misconduct and the extenuating circumstances that exist, I conclude that the Grievant shall be reinstated with her time off treated as a disciplinary suspension without pay.

The Grievant’s reinstatement is conditioned upon her satisfying all of the applicable certifications and requirements of her position. Additionally, if she has not already done so, the Grievant shall reimburse the City \$899.85, representing the amount of IOD time she improperly received. Any future abuse of leave time by the Grievant will justify her termination.

Consistent with the foregoing discussion and findings, the Arbitrator renders the following

AWARD

The grievance is sustained in part and denied in part.

The City did not have just cause to terminate the Grievant, Police Officer Kristine Amato. As a remedy, the Grievant shall be reinstated to service with her time off treated as a disciplinary suspension without pay. The Grievant's reinstatement is conditioned upon her satisfying all of the applicable certifications and requirements of her position. Additionally, if she has not already done so, the Grievant shall reimburse the City \$899.85, representing the amount of IOD time she improperly received. Any future abuse of leave time by the Grievant will justify her termination.

The undersigned will retain jurisdiction for the purpose of resolving any disputes over the implementation of this Award.

A handwritten signature in black ink, appearing to read 'James M. Darby', written over a horizontal line.

JAMES M. DARBY
Arbitrator
Lancaster, Pennsylvania
March 31, 2014